DECLARATIONS AGAINST PENAL INTEREST.—It is settled by the uniform trend of cases that under the exception to the hearsay rule in favor of declarations against interest, statements adverse to declarant's pecuniary or proprietary interest may be admitted when he has become unavailable as a witness. Whether this exception should be limited to statements against pecuniary or proprietary interest is a question which has often been raised, and which was answered in the affirmative in the recent case of *Donnelly* v. *United States,* 33 Sup. Ct. 449.

Respondent, charged with murder, gave in evidence facts tending to connect one Dick with the crime, and then offered Dick's dying confession of the murder. The proffered evidence was excluded by the trial court, and on appeal the ruling was affirmed by the United States Supreme Court, Justice HOLMES delivering a forceful dissenting opinion in which Justices LURTON and HUGHES concurred.

Admittedly the decision accords with the generally accepted rule, but the dissent of three such Justices as LURTON, HOLMES and HUGHES is ample excuse, if any excuse is needed, for a brief review of the history and logical status of the rule.

During the formative period of the law of evidence, while the hearsay rule was beginning to be developed and applied, there gradually arose two exceptions to the rule, one in favor of account-entries of deceased persons charging themselves with the receipt of money, and the second admitting oral declarations in disparagement of title. These two exceptions, according to WIGMORE (EVIDENCE, § 1476), were originally quite distinct, and but little more than custom, but when later it was sought to justify their admission upon grounds of logic, they were recognized as resting on the same principle, the unlikelihood that one would falsely make declarations against his own interest. *Higham* v. *Ridgway,* 10 East 109; *Middleton* v. *Melton,* 10 B & C, 317. In the latter case the court says, "It is a general principle of evidence that declarations or statements of deceased persons are admissible when they appear to have been made against their interest." The rule is here broadly stated that *all* declarations against interest made by deceased persons are admissible, the sanction of the oath being deemed unnecessary where the statement is adverse to declarant's interest, and in the following cases declarations against penal interest were admitted. *Hulet's Trial,* 5 How. St. 1185; *Standen* v. *Standen,* Peake 32; *Powell* v. *Harper,* 5 C. & P. 590. The reason assigned in *State* v. *Kirby,* 1 Strobh. 156, that "it is not to be supposed that one will falsely accuse himself of a crime," was considered as bringing the proffered confessions within the exception to the rule.

The first case distinctly limiting the rule to those declarations against a pecuniary or proprietary interest was the *Sussex Peerage Case,* 11 Cl. & F. 109, in 1844, which was obviously a departure from the then established rule. Nevertheless this was accepted by text writers as stating the law on the subject, and is now, it seems, firmly imbedded in the law of evidence.

Returning to the principal case, we find a formidable array of authorities cited by the majority, among them: *West* v. *State,* 76 Ala. 98; *Davis* v. *Commonwealth,* 95 Ky. 19; *Hopt* v. *Utah,* 110 U. S. 574; *People* v. *Hall,* 95 Cal.

598; *Davis* v. *Wood,* 1 Wheat. 6; *Lyon* v. *State,* 22 Ga. 399; *Robison* v. *State,* 114 Ga. 445; *Siple* v. *State,* 154 Ind. 647; *State* v. *Smith,* 35 Kas. 618; *State* v. *West,* 45 La. Ann. 928; *Munshower* v. *State,* 55 Md. 11; *Com.* v. *Chance,* 174 Mass. 245; *State* v. *Hack,* 118 Mo. 92; *People* v. *Schooley,* 149 N. Y. 99; *State* v. *Beverly,* 88 N. C. 632; *State* v. *Fletcher,* 24 Ore. 295; *Peck* v. *State,* 86 Tenn. 259; *State* v. *Totten,* 72 Vt. 73. The case in Wheaton's reports and the citation in 110 U. S. relate to the exclusion of hearsay in general and do not decide the exact point herein raised, so that Mr. Justice HOLMES seems justified in his assertion that the question was still an open one in the federal courts. Many of the other cases, notably those in Vermont, Tennessee and Maryland, are weakened by the fact that declarant was not shown to be unavailable as a witness and it has never been contended that such declarations could be admitted except where declarant is deceased or otherwise unavailable. So far as the opinions in these cases relate to this particular question they can be accorded only such weight as is due to dicta from such sources. In the *Donnelly* case not only was there the circumstantial evidence in support of the declaration and the guarantee of truthfulness in that declarant was speaking adversely to his own interest, but there was another fact present always recognized by the courts as a substitute for the sanctity of the oath; *i. e.,* the sense of impending death. *Woodcock's case,* Leach Cr. L. (4th Ed.) 500; *Ashton's Case,* Lew. Cr. C. 147; *State* v. *Brunette,* 13 La. Ann. 45; *Tracy* v. *People,* 97 Ill. 106; *People* v. *Craft,* 148 N. Y. 631.

Indeed, as the law stood at the close of the eighteenth century Dick's confession would have been competent also as a dying declaration, as the consciousness of approaching death was held sufficient to guarantee the truth of such testimony. Subsequently the courts began to emphasize necessity as the ground for the admission of dying declarations, and as it was considered that there was no necessity for accepting the dying declarations of any save the victim of the crime, the rule was limited to his declarations made as to the cause of his own death. These considerations are significant in weighing the policy of the principal case, not because Dick's statement was offered as a dying declaration, but as showing that all the safeguards were present which are required by any exception to the hearsay rule.

A glance at the case of *West* v. *State,* 76 Ala. 98, cited in the majority opinion, shows the result of the modern rule. West, on trial for murder, attempted to introduce the confession of guilt made by a third party, since dead, and the state offered the dying declaration of the victim of the assault. Both were objected to as hearsay; the dying declaration was admitted and the third party's confession was excluded, not being against his pecuniary interest. Authority aside, the result is absurdly illogical. It is incomprehensible how the statement of the murdered man, who incidentally might have been mistaken as to the identity of his assailant, could possess greater probative value or relevancy than the confession of a third party, made without the slightest possibility of error, accusing himself of a capital crime. Add to this that in the *Donnelly* case the confession was made in the presence of approaching dissolution and it is impossible to point to any logical ground for the admission either of a dying declaration or a declaration against pecuniary

interest which could not with equal force be urged in favor of the confession of Dick, corroborated as it was. The nearness of death; the impossibility of error; the nature of the confession, adverse to declarant's interests; its probative value; all are present. As the exception is now limited its application reaches this peculiar result; the statement of a third party unavailable as a witness charging himself with financial liability in some paltry sum is admissible as against interest; his confession of guilt of the highest crime known to the law is excluded as hearsay.

The reasoning of the minority, as expressed by Justice HOLMES, possesses great weight. Briefly it is, that the rules of evidence are the rules of logic and good sense, unhampered in the main by precedent, and the case being res nova in the federal courts, that rule should be adopted which is most consonant with reason and justice. Says the learned judge, "The exception to the hearsay rule in the case of declarations against interest is well known; no other statement is so much against interest as a confession of murder; it is far more calculated to convince than dying declarations which would be let in to hang a man, and when we surround the accused with so many safeguards, some of which seem to me excessive, I think we ought to give him the benefit of a fact that, if proved, commonly would have such weight."

S. S. W.